

Advisory Opinion

IECDB AO 2018-04

July 13, 2018

Karen Austin, Deputy Treasurer
Treasurer of State
Lucas State Office Building
321 E 12th Street
Des Moines, Iowa 50319

Dear Ms. Austin,

This opinion is in response to your request for an opinion from the Iowa Ethics and Campaign Disclosure Board pursuant to Iowa Code section 68B.32A(12) and rule 351-1.2. We note at the outset that the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

FACTUAL STATEMENT:

You are the Deputy Treasurer and you advise us you are seeking guidance on behalf of the State Treasurer Michael Fitzgerald to ensure compliance with Iowa Code section 68A.405A.

The Treasurer is responsible for the performance of various duties under both the Iowa Constitution and Code. Programs that the Treasurer is statutorily empowered to administer include College Savings Iowa and the IAdvisor 529 Plan under the Iowa Educational Savings Plan Trustⁱ and unclaimed propertyⁱⁱ, commonly known as "The Great Iowa Treasurer Hunt."

You provide us with a brief description of each program:

- Great Iowa Treasure Hunt – a program to return unclaimed property to rightful owners through a variety of search efforts.
- College Savings Iowa – a college savings program distributed directly to savers inside and outside of Iowa. Over half of the assets in the program are invested by people outside of the state of Iowa.
- IABLE – a savings program for persons with disabilities and their families.
- IAdvisor 529 Plan – a college savings program distributed through an advisor.

Under Iowa Code section 68A.405A, a statewide elected official shall not

permit the expenditure public moneys under the control of the statewide elected official . . . , including but not limited to moneys held in a private trust fund as defined by section 8.2, for the purpose of any paid advertisement or promotion bearing the written name, likeness, or voice of the statewide elected official . . . distributed through any of the following means:

- (1) A paid direct mass mailing.
- (2) A paid radio advertisement or promotion.
- (3) A paid newspaper advertisement or promotion.
- (4) A paid television advertisement or promotion.
- (5) A paid internet advertisement or promotion.
- (6) A paid exhibit display at the Iowa state fair or a fairground or grounds as defined in section 174.1.ⁱⁱⁱ

The prohibition does not apply to “bona fide ministerial or ceremonial records or ordinary, common, and frequent constituent correspondence containing the name of the statewide elected official.”^{iv}

The statute further provides that a person who “willfully violates” the statute “shall be subject to a civil penalty of an amount up to the amount of moneys . . . used to fund the communication,” which “shall be paid by the [statewide elected official’s] candidate’s committee.”^v A violator may also be subject to additional criminal or civil penalties available under section 68A.701 or established by the board pursuant to section 68B.32A.^{vi}

Today we adopt advisory opinion 2018-03 to offer some general guidance on section 68A.405. Because the Treasurer’s office has some unique issues with respect to the law, you asked for a separate opinion.

QUESTIONS:

Your request posed a series of questions. To the extent our advisory opinion 2018-03 does not answer those questions, we will address them below.

OPINION:

Question #1: May the Treasurer’s office continue to use logos that contain the Treasurer’s name?

Iowa Code section 68A.405A prohibits a statewide elected official from expending or permitting the expenditure of public moneys for six listed types of advertisements if those advertisements bear the written name, likeness or voice of the statewide elected official. Whether the use of a logo bearing the name of a statewide elected official is permissible is based entirely on context. In many instances, such a logo could be used and section 68A.405A would not apply. For example, brochures, business cards, articles of clothing, and official websites may bear the logo because those items are not within the scope of section 68A.405A. However, it would be impermissible under the law for the Treasurer's office to send a paid direct mass mailing^{vii} promoting one of the programs administered by the Treasurer that included a logo bearing the Treasurer's name because paid direct mass mailing is one of the six types of communications listed in the law.

Question #2: Are funds held under the Iowa Educational Savings Plan Trust or The Great Treasure Hunt “public moneys” under section 68A.405A?

Yes. Iowa Code section 68A.405A prohibits a statewide elected official from expending or permitting the expenditure of “public moneys under the control of the statewide elected official . . . , including but not limited to moneys held in a private trust fund as defined by section 8.2” for certain types of advertisements or promotions. Section 8.2 defines “private trust funds” to mean “any and all endowment funds and any and all moneys received by a department or establishment from private persons to be held in trust and expended as directed by the donor.”

You explain Iowa's 529 Plans under the Iowa Education Savings Plan Trust are programs which allow individuals to make financial contributions for future education expenses and benefit from tax-advantaged treatment. Both assets and earnings belong exclusively to plan beneficiaries and are not the property of the state.^{viii} Under Iowa Code section 12D.2, the Treasurer is the trustee of the Iowa Educational Savings Plan Trust and has been given all powers necessary to carry out and effectuate the purposes, objectives, of the Trust. As authorized by state law,^{ix} administrative fees are assessed against plan assets.

The Great Iowa Treasure Hunt involves the location and payment of owners of unclaimed bank accounts, utility refunds, matured life insurance proceeds, and other abandoned financial assets reported by businesses pursuant to the Iowa Uniform Disposition of Unclaimed Property Act.^x The Treasurer is the administrator of the unclaimed property program, responsible for both the reporting of property by businesses and its payment to reappearing owners. The state does not take title to reported property and owners may claim an entitlement in perpetuity. Unclaimed property is transferred to the general fund for the state's use until missing owners are repaid. However, prior to undertaking such transfer to the general fund, the Treasurer is

authorized to deduct “any costs... of mailing and publication in connection with any abandoned property.”^{xi}

We are of the opinion the Iowa Savings Plan Trust and the unclaimed moneys held in trust are exactly the type of funds the legislature intended to include within the scope of section 68A.405A when it referenced moneys held in a private trust fund as defined by section 8.2. While we appreciate these programs are not appropriated money by the legislature, the Treasurer is holding the funds in trust to be expended as directed by the donors or owners.

Question #3: Are expenses incurred by program managers “under the control of the statewide elected official”?

Yes. You note that College Savings Iowa, IAdvisor 529 Plan and IAble have program managers, which are third party vendors hired to operate these plans. The program managers collect fees from the plan participants. Under your contracts with the program managers, a portion of those fees are provided to the trusts to pay trusts-related expenses. The rest of the fees are retained by the program managers and are used in part to market the funds.

We are of the opinion that marketing expenses paid by the program managers out of fees they collect from plan participants are “under the control” of the Treasurer. The Treasurer is the statutory administrator of these programs. The program managers are performing duties on behalf of the Treasurer pursuant to contractual obligations. We do not believe expenses fall outside the scope of section 68A.405A simply because an official outsources some of the official’s duties.

Question #4: What is the definition of a bona fide ministerial or ceremonial record?

Iowa Code section 68A.405A exempts from coverage “bona fide ministerial or ceremonial records.”^{xii}

Like you, we are struggling to come up with a comprehensive definition of what is a bona fide ministerial or ceremonial record. However, we doubt one is necessary because a ministerial or ceremonial record does not conceivably come within the scope of the six types of communications that are impacted by section 68A.405.

You also ask for clarification on whether the following types of documents would be bona fide ministerial or ceremonial records:

- Information provided with a check payment
- Forms for all programs
- Letterhead for general purposes and all programs

- Press releases
- Mailing envelopes
- Return envelopes
- Enrollment materials for our 529 Programs and IAble
- Legal program descriptions for our 529 Programs and IAble
- Program brochures
- Program posters

We would need more contexts to determine whether section 68A.405A applies to any of these items. However, our advisory opinion 2018-03 should be very helpful to this question. For example, that opinion defines a “paid direct mass mailing” to mean a mailing that meets all of the following criteria:

- a. The primary purpose of the mailing is to attract public attention to something or someone being promoted by the statewide elected official, such as a product, person, service, policy, program, initiative, law, legislation, event or activity.
- b. The mailing is printed material delivered by United States mail or other delivery service.
- c. The mailing is sent to more than 500 physical addresses.
- d. The pieces of mail are of an identical or substantially similar nature.
- e. The mailings are sent at the same time or within any 30 day period.

Information provided with a check payment would not meet this definition because each mailing would be unique to the individual and not identical or substantially similar to 500 or more other pieces of mail sent from your office.

Forms, enrollment materials, brochures, and legal descriptions would not be impacted by Iowa Code section 68A.405A unless they were part of a “paid direct mass mailing.” We do not believe correspondence with existing plan participants would ever meet the definition of “paid direct mass mailing” unless you sent a mass mailing promoting a new program to plan participants. That is because the primary purpose of the mailing would not be to promote the program but to inform participants of information relevant to their existing accounts.

Again, it is difficult to answer a question about envelopes and letterhead in a vacuum. If a mailing piece meets the above definition of a “paid direct mass mailing” then the envelope is part of the mailing piece and would not be considered a ministerial or ceremonial record. Likewise, the use of letterhead including the name and/or likeness of a statewide elected official would not be impacted by section 68A.405A unless the letterhead is used as part of a “paid direct mass mailing.”

Press releases are not normally mailed en masse via the United States post office but if they were they would likely qualify as a bona fide ministerial record.

Program posters would not be impacted by section 68A.405A unless they were part of a paid fair exhibit display. We think it is unlikely that a poster would ever be considered a ministerial or ceremonial record.

Question #5: What is the definition of “ordinary, common and frequent constituent correspondence?”

Iowa Code section 68A.405A exempts from coverage “ordinary, common and frequent constituent correspondence.” We believe the legislature used this language to make clear that only “mass mailing” that was promotional in nature is covered by the law. We read this exemption to mean that statewide elected officials may continue to send correspondence with their name or likeness in the letterhead or on the signature line or even in the body of the letter or materials sent provided the piece of mail does not meet the definition of a “paid direct mass mailing.”

You provide a list of types of correspondence your office sends and would like clarification on whether section 68A.405A would apply to them.

- Mailed and emailed information to College Savings Iowa leads (people who have indicated at events or through giveaways that they would like more information about College Savings Iowa)
- Mailed and emailed information to 529 College Savings Participants
- Mailed and emailed information to 529 College Savings non-responders (people who have requested information from our program, but have not opened an account).
- Mailed and emailed quarterly statements
- Mailed and emailed program updates
- Mailed and emailed deadline reminders

We refer you once again to our definition of “paid direct mass mailing” in advisory opinion 2018-03 and our answer to question number 4 in this opinion. Informational material sent to individuals who have requested the material would not qualify as a “paid direct mass mailing” even if the same materials are sent to more than 500 physical addresses within a thirty day period by United States mail or similar delivery system.

Question #6: How should we treat activities that are difficult to categorize among those listed in section 68A.405?

Programs administered by the Treasurer’s office advertise in creative ways that you find difficult to categorize among the listed types of advertisements and

promotions in section 68A.405. You mention that one program manager has suggested paid advertising through Connected TV, which uses sites like Hulu and YouTube to present viewers with digital video, but people access it through their television. Based on your description of Connected TV, we believe paid advertising using Connected TV would qualify as a “paid television advertisement” or a “paid internet advertisement” if viewed on another type of electronic device such as a computer, tablet or phone.

You also note that College Savings Iowa utilizes paid search or search engine marketing to cause College Savings Iowa to come up first in a list of search results in Google and other search engines. We believe this activity would qualify as a “paid internet advertisement or promotion” under section 68A.405A. Thus the advertisement or web address that comes up as a result of paid search shall not contain the name, likeness or voice of the statewide elected official. You note that while the search result does not mention the Treasurer by name or include his likeness, the search engine user will be taken to the College Savings Iowa website if the user clicks on the search engine result listing College Savings Iowa. The underlying website does contain the Treasurer’s name and likeness. We will treat paid search or search engine marketing similar to paid social media boosts. As long as the paid search or search engine marketing does not cause an advertisement or listing to be shown containing the statewide elected official’s name, likeness or voice, we do not believe section 68A.405 would be violated even if the click through takes the search engine user to a website containing the name, likeness or voice of the statewide elected official.

College Savings Iowa also pays a flat monthly fee to SavingForCollege.com for anyone that clicks on “enroll now” in relation to a description of College Savings Iowa. SavingsForCollege.com does not contain the name, likeness or voice of the Treasurer but the “enroll now” button takes the user to College Savings Iowa’s website that does contain the name and likeness of the Treasurer. We consider this lead purchasing on SavingsForCollege.com to be a “paid internet advertisement or promotion” under section 68A.405A. Similar to social media posts and paid search, we do not believe section 68A.405A is violated as long as the content on SavingsForCollege.com does not contain the Treasurer’s name, likeness or voice.

Question #7: What is the definition of “willfully violates?”

Iowa Code section 68A.405A is quite punitive if the board finds a person “willfully violates” this section. In defining willfulness in section 68A.701, the supreme court of Iowa held “willfully” means “a voluntary and intentional violation of a known legal duty.”^{xiii} We adopt this definition for purposes of determining whether a person “willfully violates” section 68A.405A.

You note that the Treasurer's office utilizes program managers or vendors to assist with your programs. You are advising those program managers and vendors of the scope of section 68A.405A and directing them to comply with the law. However, you are concerned that one of the program managers may inadvertently violate the law. While we cannot prejudge or predict how we would handle this hypothetical violation, we can say that we would carefully consider what steps the Treasurer's office took to educate its staff and outside vendors regarding section 68A.405A and whether the Treasurer had any knowledge or involvement in the communication that violated the statute.

CONCLUSION:

Iowa Code section 68A.405A is a highly technical statute without the benefit of defined terms. We appreciate you requesting this opinion and giving us the opportunity to consider the innumerable ways section 68A.405A potentially impacts the Treasurer's office. We encourage you to continue to seek guidance from our staff in order to ensure compliance with the statute.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair
John Walsh, Vice Chair
Carole Tillotson
Jonathan Roos
Mary Rueter
Elaine Olson

Submitted by Megan Tooker, Board Legal Counsel

ⁱ See Iowa Code ch. 12D.

ⁱⁱ See *id.* ch. 556.

ⁱⁱⁱ *Id.* § 68A.405A(1).

^{iv} *Id.* § 68A.405A(1)(a).

^v *Id.* § 68A.405A(2).

^{vi} *Id.*

^{vii} See IECDB AO 2018-03 for the definition of a "paid direct mass mailing."

^{viii} Iowa Code § 12D.10.

^{ix} See *id.* § 12D.2(14).

^x *Id.* Ch. 556.

^{xi} *Id.* § 556.18(2)(b).

^{xii} *Id.* § 68A.405A(1)(b).

^{xiii} *State v. Azneer*, 526 N.W.2d 298, 300 (Iowa 1995).